No. 90-143

In The
Supreme Court of the United States
OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DIGIOVANNI,

Petitioners,

v.

BRIAN K. DOEHR,

Respondent.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE CONNECTICUT BANKERS ASSOCIATION AND THE SAVINGS BANKS' ASSOCIATION OF CONNECTICUT AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Printed by
Brenzo's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4264

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On October 1, 1990, this Court granted certiorari in this case and granted the motion of the Connecticut Bankers Association and the Savings Banks' Association of Connecticut for leave to file a brief as amici curiae in support of the State of Connecticut's petition for a writ of certiorari. The amici respectfully move for leave to file the accompanying brief as amici curiae on the merits pursuant to Rule 37.3 of the Rules of this Court. The consent of the Petitioners, the State of Connecticut and John F. DiGiovanni, have been filed with this motion. The Respondent, Brian K. Doehr, has refused to consent to the filing of the brief.

INTEREST OF THE AMICI CURIAE

Almost all Connecticut banks are members of either the Connecticut Bankers Association or the Savings Banks' Association of Connecticut. The Connecticut Bankers Association, formed in 1899, is comprised of 52 commercial banks, trust companies and other banking institutions in Connecticut. The Savings Banks' Association of Connecticut, formed in 1902, is comprised of 64 savings banks. The purpose of both associations is to contribute to a sound banking system in the State of Connecticut and to promote the general welfare and interests of their member banks.[1]

While prejudgment security has always been important to the amici and other creditors in the collection of unsecured loans, it also now is significant in Connecticut in the collection of both commercial and residential real estate loans. The decline in real estate values in Connecticut has caused loans which were fully secured when made to be undersecured now. Due primarily to the economic downturn in Connecticut and the resulting loan defaults, particularly in the real estate market, the member banks of the amici have initiated and will continue to initiate litigation to collect hundreds of millions of dollars

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[1] A list of the member banks of the amici is listed at pp. 1A-4A of the Appendix ("App.") of Amici Curiae attached hereto.

of loans in default. The economic downturn in Connecticut also has caused debtors to go to greater lengths than usual to dispute, attempt to avoid, or delay payment of their debts. Accordingly, obtaining effective prejudgment security is vital to the amici and other creditors in Connecticut.

Banks' and other creditors' most efficient, effective and expeditious form of prejudgment security has been *ex parte* real estate attachments obtained pursuant to Conn. Gen. Stat. § 52-278e(a)(1), the statute invalidated by the Second Circuit in this case. Among the issues the amici will address are the adverse effects of the Second Circuit's decision on the price and availability of credit and on the efficient resolution of creditor-debtor disputes in Connecticut. The amici also will demonstrate that even if § 52-278(a)(1) were unconstitutional as applied in this case, the Second Circuit should not have invalidated the statute on its face. The State of Connecticut and John F. DiGiovanni have emphasized other issues in their brief.

For all the foregoing reasons, the Connecticut Bankers Association and the Savings Banks' Association of Connecticut respectfully move for leave to file the accompanying brief as amici curiae.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE

The interest of the Connecticut Bankers Association and the Savings Banks' Association of Connecticut in this case is set forth in the accompanying Motion For Leave To File Brief as Amici Curiae.

SUMMARY OF ARGUMENT

Connecticut's prejudgment remedy statutes provide significant procedural and substantive protections against wrongful attachment. Connecticut's *ex parte* real estate attachment statute, Conn. Gen. Stat. § 52-278e(a)(1), allows *ex parte* attachments of real estate only if a judge finds probable cause based on a factual affidavit. Connecticut's prejudgment remedy statutes provide for an expeditious post-attachment hearing at the defendant's request, allow the defendant at anytime to substitute a bond or other property for the liened property, require that a defendant be given notice of these rights, and provide for immediate appellate rights. Under Connecticut law, the defendant also has a double damages cause of action for wrongful attachment.

Nevertheless, the Second Circuit, stating that attachment is an "extraordinary . . . remedy," held § 52-278e(a)(1) unconstitutional on its face because it does not provide for prior notice and hearing. The Second Circuit erred by holding that a real estate attachment may issue *ex parte* only if extraordinary circumstances exist. The Second Circuit also erred because the Connecticut prejudgment remedy statutes fairly balance the interests of debtors, creditors and the State. The deprivation, if any, caused by a real estate attachment is de minimis, and is ameliorated by the debtor's right to an immediate hearing to dissolve the attachment, and absolute right to substitute a bond for the attachment. The risk of an erroneous deprivation is minimal because of judicial supervision of the attachment process and because under Connecticut law debtors have a cause of action for wrongful attachment. The decision will adversely affect the important state interests in regulating the price and availability of

credit in Connecticut and the efficient resolution of creditor-debtor disputes. Finally, even assuming that the Second Circuit correctly decided that the risk of an erroneous deprivation without a hearing is substantial in a case such as this, involving an alleged assault and battery, the court should not have invalidated § 52-278e(a)(1) on its face, because the statute typically is utilized in creditor-debtor disputes, in which documentary proof minimizes the risk of an erroneous deprivation.

ARGUMENT

I. SECTION 52-278e(a)(1) COMPORTS WITH DUE PROCESS BECAUSE IT FAIRLY ACCOMMODATES THE INTERESTS OF DEBTORS, CREDITORS AND THE STATE.

A. The Second Circuit Erred In Holding That Attachment Of Real Estate Without Prior Notice And A Hearing Is Permissible Only If Extraordinary Circumstances Exist.

The Second Circuit stated that this Court's decisions require prior notice and a hearing absent "extraordinary circumstances," which "must be truly unusual", such as "to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, [or] to protect the public from misbranded drugs and contaminated food." *Pinsky v. Duncan*, 898 F.2d 852, 854, 855 (2d Cir. 1990) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972)). This standard is contrary to decisions of this Court approving property deprivations without notice and hearing and absent such "extraordinary circumstances". *See, e.g., Zinermon v. Burch*, ___ U.S. ___, 110 S. Ct. 975, 984 (1990); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (prior hearing unnecessary to terminate social security payments); *Barry v. Barchi*, 443 U.S. 55 (1979) (hearing not necessary prior to suspension of horsetrainer's license); *cf. Ingraham v. Wright*, 430 U.S. 651, 682 (1977)

(hearing not required before corporal punishment of junior high school students).

This Court in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), did not require "a national war effort" or similar extraordinary circumstances to hold that a predeprivation hearing was not constitutionally required, and made clear that with respect to prejudgment remedies prior notice and hearing typically were not required:

> The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931) . . .
>
> 'It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.' (quoting *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950)).
>
> More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors, without notice, hearing, or judicial order, saying that 'nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit.' (quoting *Coffin Brothers v. Bennett*, 277 U.S. 29, 31 (1928)).

Mitchell v. W.T. Grant Co., supra, 416 U.S. at 611-613.

Mitchell was confirmed in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), in which this Court held that a

Georgia garnishment statute violated the Fourteenth Amendment because, *inter alia*, it did not provide for an "early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment." *Id.* at 606, 607; *see Id.* at 611 (Powell, J. concurring) ("Pregarnishment notice and a prior hearing have not been constitutionally mandated in the past . . . Such restrictions, antithetical to the very purpose of the remedy, would leave little efficacy to the garnishment and attachment laws of the 50 States.") (footnote omitted). "By adopting the *Mitchell* analysis . . . the *Di-Chem* Court implicitly rejected the *Fuentes* requirement that preseizure notice and hearing be given in all but extraordinary cases. Instead, the Court seemed to indicate that a prejudgment remedy satisfies due process if the statute provides for either preseizure notice and hearing or adequate safeguards combined with an early postseizure hearing." Hansford, *Procedural Due Process in the Debtor-Creditor Relationship: The Impact of Di-Chem*, 9 Ga. L. Rev. 589, 605-06 (1975) (footnote omitted).[1]

This Court should find that the Second Circuit erred in holding that a real estate attachment without prior hearing and notice is permissible only if extraordinary circumstances exist.

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[1] *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 691 (1974) (White, J., concurring) ("presence of important public interests . . . is only one of the situations in which no prior hearing is required."); Pearson, *Due Process and the Debtor: The Impact of Mitchell v. W.T. Grant*, 29 Okla. L. Rev. 277, 293, 318 (1976) (footnote omitted) ("After *Mitchell* and *Di-Chem*, the [Fuentes] "extraordinary situations" rule might well be considered something of a relic."); *see* Note, *The Constitutionality of Real Estate Attachments*, 37 Wash. & Lee L. Rev. 701, 710 (1980) (*Mitchell* and *North Georgia Finishing, Inc.* "dispens[ed] with the requirement of a prior hearing when the attachment statute provides for a prompt post-seizure hearing."); *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526, 534 n.16 (5th Cir. 1978).

B. Section 52-278e(a)(1) Satisfies The Fourteenth Amendment Because A Real Estate Attachment Is A De Minimis Deprivation, The Risk Of An Erroneous Deprivation Is Minimal, And The Statute Promotes Significant State Interests.

Three factors are relevant in determining if a statute violates the due process clause:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, supra, 424 U.S. at 335.

In creditor-debtor disputes, the "procedural protection is adequate if it represents a *fair accommodation* of the respective interests of creditor and debtor." *Republic Indus. v. Central Pa. Teamsters Pension Fund*, 534 F. Supp. 1340, 1345 (E.D. Pa.), *rev'd on other grounds*, 693 F.2d 290 (3d Cir. 1982) (quoting in part *Finberg v. Sullivan*, 634 F.2d 50, 58 (3d Cir. 1980) (en banc)).

The Second Circuit failed to consider that the degree and the possible length of wrongful deprivation caused by a real estate attachment pursuant to the Connecticut prejudgment remedy statutes

are de minimis.[2] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982); *Memphis Light, Gas & Water Division v. Craft*, 436

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[2] Based on this Court's precedents the Second Circuit should not have held that a real estate attachment constitutes a Fourteenth Amendment deprivation of property. Lower courts, in decisions approved by this Court, have held that non-possessory real estate liens do not constitute a deprivation of property, because they do not prohibit the possession, use, renting or transfer of real property. *Bustell v. Bustell*, 107 Mont. 457, 555 P.2d 722 (1976), *appeal dismissed*, 430 U.S. 925 (1977); *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), *aff'd*, 417 U.S. 901 (1974); *see Matter of Northwest Homes of Chehalis, Inc.*, 526 F.2d 505 (9th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976).

The court in *Spielman-Fond, Inc.* held that the recording of a mechanic's lien certificate without prior hearing and notice to the property owner did not violate the Fourteenth Amendment due process clause. The sole basis for the court's decision was that the recording of the lien did not constitute a deprivation of property. *Spielman-Fond, Inc., supra*, 379 F. Supp. at 999. This Court summarily affirmed *Spielman-Fond Inc.*, 417 U.S. 901 (1974).

The court in *Matter of Northwest Homes of Chehalis, Inc.*, stating that the effect of a real property attachment "is exactly the same as the effect of the notice of lien in *Spielman-Fond*," relied on this Court's affirmance of *Spielman-Fond, Inc.* in holding that an *ex parte* real estate attachment did not constitute a deprivation of property for purposes of the Fourteenth Amendment. *Id.* at 506. This Court denied certiorari in *Matter of Northwest Homes*, 425 U.S. 907 (1976).

The issue in *Bustell v. Bustell* was whether a real estate attachment violated the Fourteenth Amendment because it was issued without prior notice or hearing. The *Bustell* Court, relying on both *Matter of Northwest Homes of Chehalis, Inc.* and *Spielman-Fond, Inc.*, held that the attachment did not violate the Fourteenth Amendment because it did not constitute a property deprivation. *Bustell v. Bustell, supra*, 555 P.2d at 724. This Court dismissed an appeal of *Bustell* for want of a substantial federal question. 430 U.S. 925 (1977).

In reliance on this Court's affirmance of *Spielman-Fond, Inc.*, other courts have held that *ex parte* attachments of real estate do not constitute a

(*Continued . . .*)

(*. . . Continued*)

Fourteenth Amendment deprivation of property. *Pay 'N Save Corp. v. Eads*, 53 Wash. App. 443, 767 P.2d 592 (1989); *First Recreation Corp. v. Amoroso*, 113 Ariz. 572, 558 P.2d 917 (1976); *see also In re Thomas A. Cary, Inc.*, 412 F. Supp. 667 (E.D. Va. 1976), *aff'd without op.*, 562 F.2d 48 (4th Cir. 1977); *In re The Oronoka*, 393 F. Supp. 1311 (D. Me. 1975); *Morse v. Rentar Ind. Development Corp.*, 85 Misc. 2d 304, 379 N.Y.S.2d 994 (1976), *aff'd*, 56 A.D.2d 303, 391 N.Y.S.2d 425 (1977), *aff'd*, 43 N.Y. 2d 952, 404 N.Y.S.2d 343, 375 N.E.2d 409, *appeal dismissed*, 439 U.S. 804 (1978) (all relying on *Spielman-Fond, Inc.* in holding that recording a mechanic's lien certificate does not constitute a Fourteenth Amendment property deprivation.)

The precise issue decided in *Spielman-Fond, Inc.* and *Bustell* was that a non-possessory real estate lien does not constitute a deprivation of property. This Court's summary dispositions in those cases are binding on the Courts of Appeals as to that issue. *See e.g. Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

In holding that a real estate attachment constituted a Fourteenth Amendment deprivation of property, the court below attempted to distinguish *Spielman-Fond, Inc.* by noting that mechanic's lienors, unlike general creditors, must have a pre-existing right in the property. *Pinsky v. Duncan*, 898 F.2d 852, 854 (2d Cir. 1990). This attempt to distinguish *Spielman-Fond, Inc.* is not persuasive because, regardless of the creditor's pre-existing interest in the property, mechanic's lien certificates and real estate attachments have "exactly the same . . . effect" on the debtor's interest in the property. *Matter of Northwest Homes of Chehalis, Inc., supra*, 526 F.2d at 506.

The court below also decided that a real estate attachment is a deprivation because the attachment could impair the marketability of the property, harm the owner's credit rating and prevent the property from being used as collateral. *Pinsky, supra*, 898 F.2d at 854. The same potential effects were present as a result of the mechanic's lien in *Spielman-Fond, Inc.* and the attachment in *Bustell*, but both courts, in cases approved by this Court, found no deprivation of property. *See also McInnes v. McKay*, 127 Me. 110, 141 A. 669 (1928), *aff'd sub nom McKay v. McInnes*, 279 U.S. 820 (1929) (real estate attachment without

(*Continued . . .*)

U.S. 1,19 (1978); *Mathews v. Eldridge, supra*, 424 U.S. at 341; *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 618. The deprivation caused by a real estate attachment is insignificant compared to the *ex parte* repossession of personal property approved by this Court in *Mitchell*. A real estate attachment in no way interferes with the defendant's use or possession of the property, and a defendant's livelihood is not threatened by a real estate attachment. *Pinsky v. Duncan*, 716 F. Supp. 58, 60 (D. Conn. 1989), *rev'd on other grounds*, 898 F.2d 852 (2d Cir.), *amended*, 907 F.2d 17 (2d Cir.), *cert. granted*, 59 U.S.L.W. 3243 (U.S. Oct. 2, 1990) (No. 90-143). Accordingly, there is no "basis to apply the same due process protections deemed necessary for these total deprivations of property [in *Sniadach, v. Family Finance Corp.*, 395 U.S. 337 (1969), *Fuentes, Mitchell* and *North Georgia Finishing, Inc.*] to the relatively minor impairment of interests covered by an attachment of real estate." *Pinsky v. Duncan, supra*, 898 F.2d at 863 (Newman, J., dissenting); *Williams v. Bartlett*, 189 Conn. 471, 479, 457 A.2d 290, 294, *appeal dismissed*, 464 U.S. 801 (1983) (deprivation caused by lis pendens is de minimis and requires less protections than total deprivations of property in *Sniadach* and *Fuentes*).

The Second Circuit also failed to consider the potential length of the deprivation:

> The final aspect of the severity of impact test is the length of time between the initial deprivation and the full hearing on the merits. The magnitude of harm is found to increase in direct proportion to the time lapse between the deprivation and the opportunity for a full hearing.

(. . . *Continued*)

prior notice or hearing does not violate due process; cited with approval in *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 613-14.)

Newton, *Procedural Due Process and Pre-Judgment Creditor Remedies: A Proposal for Reform of the Balancing Test*, 34 Wash. & Lee L. Rev. 65, 76-77 (1977) (footnote omitted) (hereinafter "Newton"). Nowhere in its legal analysis does the court acknowledge that a defendant may immediately move to dissolve or modify the attachment, and that the trial court must then "proceed to hear and determine such motion expeditiously." Conn. Gen. Stat. § 52-278e(c). The Second Circuit also did not consider that under the Connecticut prejudgment remedy statutes, the defendant has an unqualified right to offer a bond or other property in lieu of the property which has been attached. Conn. Gen. Stat. § 52-304.

There was no indication in this case that the attachment in any way interfered with an attempted alienation of the property, *Pinsky v. Duncan, supra*, 898 F.2d at 863 (Newman, J., dissenting), and the respondent did not move in state court to dissolve or modify the attachment, but instead brought this action. This demonstrates that the deprivation, if any, caused by the attachment in this case was de minimis. *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 610; Newton, *supra* at 76; *Central Sec. Nat. Bank v. Royal Homes, Inc.*, 371 F. Supp. 476, 481 (E.D. Mich. 1974).

The Second Circuit also erred by concluding that Section 52-278e(a)(1) poses a substantial risk of an erroneous deprivation. The Second Circuit found that risk was substantial in non-debtor-creditor disputes such as the instant case, involving an alleged assault and battery, because a judge could not accurately determine probable cause in such disputes based solely on one party's version set forth in an affidavit. *Pinsky v. Duncan, supra*, 898 F.2d at 856. However, the Second Circuit failed to properly consider that the judicial control over the attachment process provided by the Connecticut prejudgment remedy statutes minimizes the risk of an erroneous deprivation. *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 616-17; *see North Georgia Finishing, Inc. v. Di-Chem, supra*, 419 U.S. at 607; *Fuentes v. Shevin, supra*, 407 U.S. at 93. Under the Connecticut prejudgment remedy statutes, defendants are

"not at the unsupervised mercy of the creditor and court functionaries. The . . . law provides for judicial control of the process from beginning to end. This control is one of the measures adopted by the State to minimize the risk that the *ex parte* procedure will lead to a wrongful taking." *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 616-17 (footnote omitted).

The risk of erroneous deprivation also is minimized by the double damages remedy provided by Conn. Gen. Stat. § 52-568, Connecticut's vexatious litigation statute, to a defendant whose property has been wrongfully attached. *See Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 610, 616-17 (potential damages award minimizes the risk of an erroneous deprivation.)

> [P]rior hearings might well be dispensed with in many circumstances in which the state's conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the fourteenth amendment encompasses the same liberties as those protected by the common law.

Ingraham v. Wright, supra, 430 U.S. at 679 n.47 (1977) (quoting Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405, 431 (1977) (footnote omitted)).

> When only an invasion of a property interest is involved, there is a greater likelihood that a damages award will make a person completely whole than when an invasion of the individual's interest in freedom from bodily restraint and punishment has occurred. In the property context, therefore, frequently a post-deprivation state remedy may be

> all the process that the Fourteenth Amendment requires.

Id. at 701 (Stevens, J., dissenting on other grounds.)

For these reasons, the Second Circuit erred in finding that § 52-278e(a)(1) poses a high risk of erroneous deprivation.[3]

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[3] Conn. Gen. Stat. § 52-568 was not discussed in Section B of Judge Pratt's decision for the Second Circuit, addressing prior notice and hearing. Judge Pratt did discuss this damages remedy in the portion of his decision which was not joined by the other panel members, in which he decided that § 52-278e(a)(1) was constitutionally defective because it did not require the creditor to post an indemnity bond. *Id.* at 857. Judge Pratt decided that this Court in *Mitchell* held that a bond to indemnify the debtor was essential for a deprivation without hearing and notice to be constitutional. Although Judge Pratt implied that a damages cause of action would be an adequate substitute for a bond, he decided that § 52-568 was inadequate, because Judge Pratt read Connecticut law as not allowing a § 52-568 cause of action to be asserted as a counterclaim, but rather as requiring that the debtor wait until the collection action terminates before commencing an action under § 52-568. *Pinsky v. Duncan, supra*, 898 F.2d at 856-58.

In his concurring opinion, Judge Mahoney read Connecticut law as allowing a § 52-568 cause of action to be asserted as a counterclaim in the collection action, and decided that to the extent *Mitchell* required a bond or other security to be provided by the creditor, the requirement was satisfied. *Id.* at 860-61. In dissent, Judge Newman agreed with the concurrence's reading of § 52-568, and decided that the due process clause did not require a bond or damages remedy in favor of the debtor. *Id.* at 864.

Judge Pratt erred in deciding that a bond or a contemporaneous cause of action for wrongful attachment is constitutionally required. This Court has never held that a bond or cause of action for wrongful attachment is required for a deprivation of property without notice and hearing to comport with due process, and in two cases this Court has held that a bond requirement did not save an unconstitutional statute. *See, e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. at 608 (double bond requirement does not render statute constitutional); *Fuentes v.*

(*Continued . . .*)

The Second Circuit also erred in deciding that the state's interest in postponing the hearing until after attachment was, in the absence of unusual circumstances, "practically nil." *Pinsky v. Duncan, supra*, 898 F.2d at 856. This decision ignores the state's interest in providing "a reasonable and fair framework of rules which facilitate commercial transactions on a credit basis." *North Georgia Finishing, Inc. vs. Di-Chem, Inc., supra*, 419 U.S. at 610 (Powell, J., concurring). "The State's legitimate interest in facilitating creditor recovery through the provisions of garnishment remedies has never been seriously questioned." *Id; Central Sec. Nat. Bank v. Royal Homes, Inc., supra*, 371 F. Supp. at 480 (E.D. Mich. 1974). The Second Circuit's decision also ignores this Court's recognition in *Mitchell* that the state has an interest in facilitating debt collection by allowing a seizure without notice in order to prevent debtors from defeating a creditor's lien by transferring property. *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 608, 609.

As set forth more fully in the Motion for Leave to File Brief of the Amici Curiae, Connecticut banks and creditors have a substantial need to obtain prejudgment security. For many reasons, real estate attachments are the prejudgment security most sought by banks and other creditors in Connecticut. Real estate ownership is a matter of public record in Connecticut and, therefore, real estate owned by a defendant can expeditiously be located. Since a real estate

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Shevin, supra, 407 U.S. at 83 (same). The purpose of a bond or damages cause of action in favor of the debtor is to provide an incentive to the creditor not to effectuate an erroneous deprivation. *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 610, 616-17. Even assuming that a debtor may bring a § 52-568 cause of action only after a collection action has terminated, the incentive for the creditor not to effectuate an erroneous deprivation exists at the time the creditor applies for the attachment. Accordingly, even if a damages remedy is constitutionally required, § 52-568, however interpreted, satisfies that requirement.

attachment is accomplished by recording a certificate on land records, there is no cost (such as storage) to maintain the attachment during the litigation. The value of real estate, as opposed to personal property, typically does not substantially decline during the pendency of litigation. Also, real estate attachments facilitate resolution of debtor-creditor disputes by insuring that a debtor cannot avoid a debt by disposing of assets.

Ex parte real estate attachments are important because they prevent debtors from conveying, encumbering or otherwise alienating real estate prior to attachment. *See Mitchell, supra*, 416 U.S. at 609 ("The danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied. The notice itself may furnish a warning to the debtor acting in bad faith."); *North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. at 610 (Powell, J., concurring) ("[G]arnishment and attachment remedies afford the actual or potential judgment creditor a means of assuring, under appropriate circumstances, that the debtor will not remove from the jurisdiction, encumber or otherwise dispose of certain assets then available to satisfy the creditor's claim."); Scott, *Constitutional Regulation Of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 Va. L. Rev. 807, 847 (1975) (hereinafter "Scott."). *Ex parte* attachments are especially important now because of the current economic downturn in Connecticut, which has substantially increased the number of defaulting debtors, has caused secured real estate loans to become undersecured, and has resulted in debtors going to greater lengths than usual to avoid or delay payment of legitimate debts.[4]

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[4] Section 52-278e(a)(1) does not require as a prerequisite to an *ex parte* real estate attachment that a creditor show that the debtor will dispose of real property if notice is given. The statute upheld by this Court in *Mitchell* also did not require such a showing as a prerequisite to a sequestration of personal property without notice and hearing:

(*Continued . . .*)

The Second Circuit did not consider the substantial societal and private costs of its decision, as it should have. *Mathews v. Eldridge, supra*, 424 U.S. at 347. Inability to obtain *ex parte* prejudgment real estate attachments will increase the likelihood that creditors will be unable to obtain prejudgment security and satisfaction of judgments. As a result of increased cost of enforcement and write-offs of uncollectible loans, the availability of credit in Connecticut will decrease and the cost of credit will increase. *See, e.g.*, Scott, *supra*, at 810, 836-67; Newton, *supra* at 71; *Fuentes v. Shevin*, 407 U.S. at 102-03 (White, J. dissenting) (if preseizure hearings are required "the availability of credit may well be diminished or, in any event, the expense of securing it increased.") These measures will result in decreased lending activity, which would be particularly harmful now, when economic activity and lending in Connecticut are already declining.[5]

(. . . *Continued*)

> Historically, the writ would issue only if the creditor had "good reason to fear" that the debtor would damage, alienate or waste the goods, and the creditor was required to show the grounds for such fear. Under present law, however, the apprehension of the creditor is no longer the issue, and the writ may be obtained when the goods are within the power of the debtor.

Mitchell v. W.T. Grant Co., supra, 416 U.S. at 605, n.4. As the *Mitchell* Court noted, in most instances the creditor will have only an apprehension as to the debtor's plans, because the debtor's intent to transfer property will be known only to the debtor and the intended transferee until the transfer has taken place.

[5] The decision also will impose significant 'direct' or litigation costs on the enforcement process, including operating costs of the parties, lawyers, and litigants. Scott, *supra* at 810, 828, 845-53; *see North Georgia Finishing, Inc., supra*, 419 U.S. at 610 (Powell, J., concurring) ("the recent expansion of concepts of procedural due process requires a more

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The Second Circuit also failed to consider the state's interest "in conserving scarce fiscal and administrative resources..." *Mathews v. Eldridge, supra*, 424 U.S. at 348. The Second Circuit's opinion is already adversely affecting Connecticut's creditors and courts. Even though the Connecticut Supreme Court has upheld the constitutionality of § 52-278e(a)(1), *Kukanskis v. Griffith*, 180 Conn. 501, 430 A.2d 21 (1980); *Fermont Div., Dynamics Corp. of America v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979), Connecticut courts currently are not entertaining *ex parte* prejudgment real estate attachment applications absent exigent circumstances. As a result, hearings must be held prior to any prejudgment real estate attachments issuing and in some judicial districts hearings are being delayed for five months. The increase in the number of prejudgment remedy hearings and the accompanying backlog in state courts prove the accuracy of this Court's statement in *Mathews, supra*, 424 U.S. at 347 that "[w]e only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial."[6]

The Second Circuit's opinion "has the potential to create chaos within the State's legal and business communities." *Soden v. Johnson*, No. CV 83-0067730-S, slip. op. at 3 (Super. Ct. Stamford-Norwalk, March 26, 1990) (reprinted in Appendix, *see* p. 6A). The Second Circuit erred by failing to consider the state's

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careful assessment of the nature of the governmental function served by the challenged procedure and of the costs the procedure exacts of private interests.")

[6] This delay in scheduling hearings also is damaging to the state's interest in facilitating debt collections, because as a result of *Pinsky* debtors in Connecticut now have substantial opportunity and time to transfer or encumber their real estate prior to attachment.

interest in facilitating debt collection and the flow of credit in Connecticut.

In *Mitchell*, this Court held that Louisiana's sequestration statutes comported with due process, even though they authorized complete deprivation of personal property without prior notice or hearing, because: a sequestration order could only be issued by a judge based on an affidavit alleging specific facts; the debtor had an opportunity for an early post-seizure hearing to seek dissolution of the order, the debtor could regain possession of the property by posting a bond; and the debtor had a remedy against the creditor for wrongful sequestration. *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 607-619; *see North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. at 606-07 (invalidating *ex parte* garnishment statutes for failing to provide safeguards against erroneous deprivation present in *Mitchell*); *Jonnet v. Dollar Sav. Bank of City of New York*, 530 F.2d 1123, 1127 (3d Cir. 1976).

Connecticut's prejudgment remedy statutes, like the Louisiana statutes in *Mitchell*, provide for issuance of the order of attachment only by a judge based on a fact-specific affidavit, provide the debtor with the right to an immediate hearing to seek dissolution, and provide the debtor with a right to substitute a bond for the attachment. The Connecticut prejudgment remedy statutes also require that notice of these rights be served on the defendant, and provide for immediate appellate rights. Additionally, pursuant to Conn. Gen. Stat. § 52-568, the debtor has a double damages remedy for wrongful attachment. *See Pinsky v. Duncan, supra*, 898 F.2d at 860-61 (Mahoney, J., concurring).[7]

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[7] The Second Circuit erroneously attempted to distinguish *Mitchell* by limiting its applicability to cases in which a creditor claimed a pre-existing security interest in the property. *Pinsky v. Duncan, supra*, 898 F.2d at 855. If *Mitchell* was limited to secured transactions, this Court in *North Georgia Finishing, Inc. v. Di-Chem, Inc.* could have invalidated the Georgia garnishment statutes solely because they were not restricted to

(*Continued* . . .)

(. . . *Continued*)

secured transactions. Rather than doing so, this Court invalidated the Georgia statutes because they failed to contain the saving characteristics of the Louisiana statutes in *Mitchell*. Significantly, this Court in *North Georgia Finishing, Inc.* did not even mention that the creditor in *Mitchell* claimed a preexisting interest in the property. *North Georgia Finishing, Inc. v. Di-Chem, supra*, 419 U.S. at 606-07; *see, e.g.*, Note, *Debtors' and Creditors' Due Process: Applying the Balancing Standard*, 29 U. Fla. L. Rev. 554, 561-63 (1977) ("*Di-Chem* expanded the reach of *Mitchell*, for the *Di-Chem* decision implicitly refused to limit *Mitchell* to situations in which the creditor had a prior interest in the property seized. Had the Court chosen to so limit *Mitchell*, *Di-Chem* could have declared the Georgia garnishment statute unconstitutional without applying the balancing test of *Mitchell*") (footnote omitted); Hansford, *Procedural Due Process in the Debtor-Creditor Relationship: The Impact of Di-Chem*, 9 Ga. L. Rev. 589, 605, 608 (1975); Pearson, *Due Process and the Debtor: The Impact of Mitchell v. W. T. Grant*, 29 Okla. L. Rev. 277, 298-300 (1976); Newton, *Fuentes "Repossessed" Reconsidered*, 28 Baylor L. Rev. 497, 506-09 (1976); Kay & Lubin, *Making Sense of the Prejudgment Seizure Cases*, 64 Ky. L.J. 705, 720-21 (1976); Scott, *supra* at 861.

This Court properly has not limited *Mitchell* to secured transactions:

> Ultimately, the interest being vindicated in both *Mitchell* and *Di-Chem* was the creditor's right to receive payment in full on its debts, however they may have arisen. The presence of a particularized property interest like the vendor's lien in *Mitchell* does not enhance the creditor's justification for summary process. Nor does it add measurably to the accuracy of the factual determination which precedes the issuance of a summary writ. The "specific facts" requirement serves that purpose without need for reinforcement. Thus, if the creditor offers detailed and credible proof of a valid debt or other claim, even in the absence of a lien or security interest, summary process can issue without undermining the minimization-of-error rationale.

(*Continued* . . .)

For these reasons, this Court should hold that § 52-278e(a)(1) does not violate the due process clause.[8]

II. THE SECOND CIRCUIT SHOULD NOT HAVE INVALIDATED SECTION 52-278e(a)(1) ON ITS FACE.

"Federal courts . . . have a duty to decide constitutional questions when necessary to dispose of the litigation before them. But they have an equally strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration." *County Court of Ulster v. Allen*, 442 U.S. 140, 154 (1979). "It has long been thought that, when dealing with questions of constitutional law, a court is to formulate a rule of constitutional law no broader than is required by the precise facts to which it is to be applied. Principles of judicial economy dictate that constitutional issues should not be decided in the absence of the necessity to do so, and even then, only on an adequate factual record." *Deutsch v. Teel*, 400 F. Supp. 598, 606 (E.D.Wis. 1975). "[D]ecisions reaching the merits of facial constitutional challenges... are the exception and not the rule."

(. . . *Continued*)

Pearson, *Due Process and the Debtor: The Impact of Mitchell v. W. T. Grant*, 29 Okla. L. Rev. 277, 300 (1976) (footnote omitted).

[8]*See Shaumyan v. O'Neill*, 716 F. Supp. 65 (D. Conn. 1989); *Pinsky v. Duncan, supra*, 716 F. Supp. 58; *Read v. Jackson*, Civ. No. B-85-85, slip op. (D. Conn. Feb. 18, 1988); *Armstrong Cumming Architects v. Gruen*, No. B-88-680 (EBB) slip. op. (D. Conn. July 17, 1989); *Fermont Division, Dynamics Corp. of America, Inc. v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979); *Kukanskis v. Griffith*, 180 Conn. 501, 430 A.2d 21 (1980) (all holding that § 52-278e(a)(1) does not violate the due process clause.)

Martin Tractor Co. v. Federal Election Comm'n, 627 F.2d 375, 381 (D.D.C.), *cert. denied*, 449 U.S. 954 (1980).

The Second Circuit ignored these principles by invalidating § 52-278e(a)(1) on its face rather than analyzing the statute as applied. The Second Circuit apparently was concerned about the risk of an erroneous deprivation in this case, a tort action arising out of an alleged assault and battery. *Pinsky, supra*, 898 F.2d at 856. The court could have addressed this concern and determined the rights of the parties before it by holding § 52-278e(a)(1) unconstitutional as applied.

The Second Circuit erred by invalidating § 52-278e(a)(1) on its face without clear and convincing evidence that the statute operates unconstitutionally in cases in which the statute typically is utilized. Statutes "adjusting the burdens and benefits of economic life" are presumptively constitutional. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). This presumption casts a "heavy burden" on one who alleges unconstitutionality. *Mittelstaedt v. Bd. of Trustees of Univ. of Ark.*, 487 F. Supp. 960, 967 (E.D.Ark. 1980). "[A]ll doubts must be resolved in favor of the statute's legality, and only a clear showing that the statute violates the constitution will justify striking the statute." *Parcell v. Kansas*, 468 F. Supp. 1274, 1276 (D.Kan. 1979), *aff'd sub nom Parcell v. Governmental Ethics Comm'n*, 439 F.2d 628 (10th Cir. 1980).

The presumption of constitutionality and deference to the legislature are especially appropriate in the area of prejudgment remedies because legislatures are better equipped than courts to accomplish efficient resolution of debtor-creditor disputes. *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 619 n.13 ("The uncertainty evident in the current debate [over the impact of prior notice and hearing on the price of credit] suggests caution in the adoption of an inflexible constitutional rule."); Scott, *supra* at 813, 835, 865, 867; Newton, *supra* at 82.

The Second Circuit invalidated § 52-278e(a)(1) on its face even though it acknowledged, as this Court has, that in creditor-debtor disputes the risk of an erroneous deprivation is minimal because of the presence of written loan documents. *Pinsky v. Duncan, supra*, 898 F.2d at 856; *Mathews v. Eldridge, supra*, 424 U.S. at 345; *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 609, 617, 618 ("There is thus far less danger here that the seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing . . ."); *Fuentes v. Shevin, supra*, 407 U.S. at 100, 102-03 (White, J. dissenting) ("It is very doubtful in my mind that such a hearing would in fact result in protections for the debtor substantially different from those the present laws provide."); *see, Scott, supra* at 812, 842-44, 848.[9] The Second Circuit erred by invalidating § 52-278e(a)(1) on its face because there was no evidence adduced that the statute was frequently utilized by tort plaintiffs rather than creditors. Additionally, the court did not consider any evidence of the effects of its decision on the flow of credit and resolution of

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[9] This Court's conclusion that risk of erroneous deprivations is minimal in debtor-creditor disputes is buttressed by the market forces at work. *Scott, supra* at 841; *Fuentes v. Shevin, supra*, 407 U.S. at 100 (White, J. dissenting) "(Sellers are normally in the business of selling and collecting the price for their merchandise . . . it would not seem in the creditor's interest for a default occasioning repossession to occur; as a practical matter it would much better serve his interests if the transaction goes forward and is completed as planned. Dollar-and-cents considerations weigh heavily against false claims of default as well as against precipitate action that would allow no opportunity for mistakes to surface and be corrected") (footnote omitted.)

A 1978 statistical study of Connecticut's prejudgment remedy statutes concluded with respect to preattachment hearings that defendants infrequently appeared to contest attachments, and even when defendants did appear, their appearance had "little or no effect." Shuchman, *Prejudgment Attachments in Three Courts of Two States*, 27 Buffalo L. Rev. 459, 484 (1978); *see* Scott, *supra*, at 812, 817, n.37.

creditor-debtor disputes, or of the additional costs its decision would impose.

"[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge, supra*, 424 U.S. at 344; *Ownbey v. Morgan*, 256 U.S. 94, 103-04 (1921). The Second Circuit erred by relying solely on the allegations of the complaint in this case in deciding that § 52-278e(a)(1) on its face violated the due process clause.[10]

CONCLUSION

For all of the foregoing reasons, the Connecticut Bankers Association and the Savings Banks' Association of Connecticut respectfully submit that the judgment and opinion of the United States Court of Appeals for the Second Circuit that Connecticut

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[10] Even analyzing § 52-278e(a)(1) as applied, the Second Circuit should not have held the statute unconstitutional. As set forth in Section I above, the deprivation, if any, was de minimis because there was no evidence that the attachment in any way interfered with respondent's use or disposition of his property. The Second Circuit also made no determination that the probable cause finding by the state court was erroneous.

General Statutes § 52-278e(a)(1) violates the due process clause of the Fourteenth Amendment should be reversed.

Respectfully submitted,

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November 1990

APPENDIX

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MEMORANDUM OF DECISION RE: MOTION TO DISSOLVE EXISTING PREJUDGMENT REAL ESTATE ATTACHMENTS in *Soden v. Johnson*, No. CV 83-0067730-S, slip op. (Stamford-Norwalk Sup. Ct. March 26, 1990). 5A

CONNECTICUT BANKERS ASSOCIATION MEMBERS

American National Bank, Hamden
Bank of Boston Connecticut, Waterbury
Bank of Darien
Bank of East Hartford
Bank of Mystic
Bank of Southeastern Connecticut, Waterford
Bank of Southington
Bank of South Windsor
Bank of Stamford
Bank of Waterbury
BayBank Connecticut, N. A., Hartford
Brookfield Bank
Canaan National Bank
Candlewood Bank & Trust, New Fairfield
Citizens National Bank of Putnam
CityTrust, Bridgeport
Connecticut Bank & Trust, Hartford
Connecticut National Bank, Hartford
Connecticut Valley Bank, Cromwell
Equity Bank, Wethersfield
First Bank of West Hartford
First Central Bank, Hartford
First City Bank
First National Bank-CT, Hartford
First National Bank of Litchfield
First National Bank of Suffield
Fleet Bank of Connecticut
Founders Bank, New Haven
Glastonbury Bank & Trust
Greenwood Bank of Bethel
Housatonic Bank & Trust, Ansonia
Jewett City Trust Company
Lafayette Bank & Trust, Bridgeport

Landmark Bank, Hartford
Manchester State Bank
Merchants Bank & Trust, Norwalk
National Iron Bank, Salisbury
New Canaan Bank & Trust
New England Bank & Trust, Windsor
New Milford Bank & Trust
Norwalk Bank
Putnam Trust Company, Greenwich
Salisbury Bank & Trust, Lakeville
Saybrook Bank & Trust, Old Saybrook
Sentinel Bank, Hartford
Shoreline Bank & Trust, Madison
Summit National Bank, Torrington
Union Trust Company, Stamford
UST Bank Connecticut, Bridgeport
Vernon Bank
Village Bank & Trust, Ridgefield
Wilton Bank

SAVINGS BANKS' ASSOCIATION OF CONNECTICUT MEMBERS

Advest Bank, Hartford
American Bank of Connecticut, Waterbury
American Savings Bank, New Britain
Bank Mart, Bridgeport
Bank of Hartford
Branford Savings Bank
Bristol Savings Bank
Brooklyn Savings Bank, Danielson
Burritt InterFinancial Bancorporation, New Britain
Centerbank, Waterbury
Central Bank, Meriden
Chelsea Groton Savings Bank, Norwich
City Savings Bank of Meriden
Collinsville Savings Society
Colony Savings Bank, Wallingford
Community Savings Bank, Bristol
Connecticut Savings Bank, New Haven
Derby Savings Bank
Dime Savings Bank of Norwich
Dime Savings Bank of Wallingford
Essex Savings Bank
Fairfield County Savings Bank, Norwalk
Farmers & Mechanics Bank, Middletown
Farmington Savings Bank
Financial Federal Savings Bank, Hartford
First Constitution Bank, New Haven
First County Bank, Stamford
Gateway Bank, South Norwalk
Great Country Bank, Ansonia
Guilford Savings Bank
Jewett City Savings Bank
Liberty Bank for Savings, Middletown
Litchfield Bancorp

Mechanics Savings Bank, Hartford
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MidConn Bank, Kensington
Milford Bank
Moodus Savings Bank
Naugatuck Savings Bank
New Haven Savings Bank
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Norwich Savings Society
People's Bank, Bridgeport
Peoples Savings Bank, New Britain
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Ridgefield Bank
Savings Bank of Danbury
Savings Bank of Manchester
Savings Bank of Rockville
Society for Savings, Hartford
Southington Savings Bank
Stafford Savings Bank, Stafford Springs
State Bank for Savings, Southington
Suffield Bank
Thomaston Savings Bank
Tolland Bank
Torrington Savings Bank
Union Savings Bank of Danbury
Willimantic Savings Institute
Winsted Savings Bank

D.N. CV 83 0067730 S	)	SUPERIOR COURT
JOHN V. SODEN	)	
V.	)	
ROBERT E. JOHNSON, ET AL.	)	JUDICIAL DISTRICT OF STAMFORD/ NORWALK AT STAMFORD
. . . . .	)	
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V.	)	
G. BARRETT MONTGOMERY	)	

MEMORANDUM OF DECISION
RE: MOTION TO DISSOLVE EXISTING
PREJUDGMENT REAL ESTATE ATTACHMENTS

This memorandum of decision addresses issues raised in motions filed by various defendants with this court to dissolve prejudgment attachments issued against their real estate. The attachments had been obtain *ex parte*, pursuant to Conn. Gen. Stat. § 52-278e. Section 52-278e has subsequently and very recently been declared to be unconstitutional on its face by the Second Circuit Court of Appeals. The Second Circuit's opinion, announced in *Pinsky v. Duncan*, No. 89-7521 (2nd Cir. March 9, 1990), found that Connecticut's *ex parte* prejudgment real estate attachment statute was unconstitutional on its face in that it deprived a defendant of his right to a hearing prior to issuance of the attachment in violation of the due process clause of the 14th Amendment to the United State Constitution. Not surprisingly, the *Pinsky* decision has generated a great deal of controversy about the continued validity of existing prejudgment real estate attachments, and has given rise to a flurry of motions to dissolve such attachments. This memorandum will address such motions generally.

At the outset, this court acknowledges that it is bound by the decisional law of our Supreme Court. However, the court also recognizes that the *Pinsky* decision has the potential to create chaos within the state's business and legal communities. Therefore, the issues raised by the *Pinsky* decision in the motions before this court should be addressed.

While decisions of federal courts passing on federal constitutional questions should be afforded due respect by the state courts, the federal courts exercise no appellate court jurisdiction over state courts. *See United States ex. rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970); *People v. Brisbon*, 129 Ill. 2d 200, 544 N.E. 2d 297, 135 Ill. Dec. 801 (Ill. 1989). Until the United States Supreme Court has spoken, state courts are not precluded from exercising their own judgments on federal

constitutional questions. *United States ex rel. Lawrence v. Woods*, 432 F.2d at 1075, quoting the Supreme Court of Iowa in *Iowa Nat'l. Bank v. Stewart*, 214 Iowa 1229, 232 N.W. 445, 454 (1930).

Our Supreme Court has spoken on the question of the constitutionality of Conn. Gen. Stat. § 52-278e and has determined that the statute meets the due process standards of the state and federal constitutions. *Fermont Division, Dynamics Corp. of America, Inc. v. Smith*, 178 Conn. 393, 397, 423 A.2d 80 (1979). Consequently, at this point in the process of judicial review of § 52-278e, this trial court is bound by the Connecticut Supreme Court's finding of constitutionality in *Fermont*. The opinions of the Supreme Court of Connecticut are binding upon the Superior Court and ... until the court's decisions are changed, the Superior Court is bound to follow them. *Montes v. Hartford Hospital*, 26 Conn. Sup. 441, 442-43 (1966). Accordingly, as to the motions before this court which seek to vacate or dissolve existing prejudgment real estate attachments on the grounds of the Second Circuit Court of Appeals ruling in *Pinsky*, the motions are denied under *Fermont*.

However, even if this court were not bound by *Fermont*, and were to follow the *Pinsky* ruling, the question of whether *Pinsky* should be applied retroactively to invalidate all existing real estate attachments obtained through *ex parte* orders would still remain to be determined. In the interest of eliminating the speculation and uncertainty attendant to this issue, the following discussion is provided.

The United States Supreme Court considered the question of nonretroactive application of judicial decisions within a civil context in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.E. 2d 296, 92 S. Ct 349 (1971). In *Chevron*, the court identified the three factors to be weighed in each case to determine whether a judicial decision should be applied retroactively or prospectively. *Id.* at 106. First, the decision must establish a new principle of law, either by overturning clear past precedent or by deciding an issue of first

impression. *Id.* Second, the court must determine whether retrospective application of the new rule will further or retard its operation in each case. *Id.* at 107. Finally, if retroactive application of the court's decision could produce substantial inequitable results, there is ample basis for avoiding the hardship by a holding of nonretroactivity. *Id.* at 107.

Turning to the issue raised here by retroactive application of the *Pinsky* ruling, namely the continued validity of existing *ex parte* real estate attachments obtained pursuant to § 52-278e, the court concludes the new rule would be applied prospectively only.

A weighing of the merits and demerits of retroactive application of the *Pinsky* rule to existing *ex parte* real estate attachments in Connecticut demonstrates that substantial inequitable results may occur if *Pinsky* is not limited to prospective force. The decision clearly overturns past legal precedents in this state and renders unlawful statutory procedures upon which Connecticut litigants have reasonably relied. Retroactive operation of the decision will not further the operation of the rule. On the contrary, retroactive application of *Pinsky* would create hardship and injustice to creditors who have lawfully obtained attachments to secure their interests. The disruptive effect of summary dissolution of existing real estate attachments would be far-reaching and potentially devastating to an orderly business community. Issues relating to the validity of title to real estate and priority of secured interests would be implicated.

For the foregoing reasons, this court would follow the reasoning of the Supreme Courts of Massachusetts and Rhode Island, as well as the District Court of Massachusetts when, upon invalidating similar prejudgment real estate attachment statutes, those courts expressly held their decisions to have prospective application only. *See Marran v. Gorman*, 359 A.2d 694 (1976); *Bay State Harness Horse Racing and Breeding Ass'n. v. PPG Industries, Inc.*, 365 F. Supp. 1299 (D. Mass. 1973); *McIntyre v. Associates Financial Services Co.*, Mass., 328 N.E. 2d 492 (1975).

/s/
CHIOFFI, J.

Decision entered in accordance with the foregoing dated this 26th day of March, 1990.

John Morrow
Chief Clerk

All counsel notified. J.M.